STATE OF MICHIGAN

COURT OF APPEALS

YUMIKO FUJIMAKI, a/k/a YUMIKO ICHIKAWA, Plaintiff-Appellee, v AKIO FUJIMAKI, Defendant-Appellant.	UNPUBLISHED May 21, 2009 No. 288752 Washtenaw Circuit Court LC No. 02-002455-DM

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Defendant-father appeals as of right from the trial court's order changing custody of the parties' son from joint custody to sole physical and legal custody in favor of plaintiff-mother, with the change in defendant's parenting time to begin on September 28, 2008, and the change in legal custody to be effective on a temporary basis for the 2008-2009 school year. We remand for further proceedings.

I. Background

Pursuant to an amended judgment of divorce, dated May 6, 2005, the parties were awarded joint physical and legal custody of their child, such that plaintiff was to have "parenting time" with the child for eight consecutive days over a two-week period and defendant was to have "parenting time" for the other six consecutive days. Separate schedules were specified for holidays, birthdays, and summer vacation, for which each party was allowed two consecutive or nonconsecutive weeks with the child.

Numerous difficulties arose between the parties, which required repeated interventions by the trial court. In January 2008, plaintiff moved for a change in parenting time based on allegations that defendant's rigid practices and other behavior was endangering the child's well-being. Plaintiff requested that the trial court interview the child to determine his preference and current living situation. In response, defendant sought an increase in his parenting time on weekdays based on allegations that plaintiff was suffering from depression and did not do enough to assist the child with his academic performance in school. The trial court treated the parties' dispute as a request to change physical custody, which required an evidentiary hearing. In a supplemental pleading, plaintiff then sought sole physical and legal custody. After conducting an evidentiary hearing on April 7, 2008, plaintiff was awarded sole physical custody.

She was also awarded sole legal custody, but only on a temporary basis during the 2008-2009 school year.

II. Evidentiary Hearing

Defendant first argues that the trial court erred in conducting an evidentiary hearing because neither party initially requested a change in custody. We disagree.

Whether an evidentiary hearing is necessary depends on whether contested factual issues must be resolved for the trial court to make an informed decision. MCR 3.210(C)(8). The parties presented numerous factual disputes that the trial court was requested to resolve. It was within the trial court's sound discretion to schedule an evidentiary hearing to assist it in making its factual findings. We also note that because defendant also sought an evidentiary hearing in his response to plaintiff's motion, defendant waived any objection to the trial court's decision to schedule an evidentiary hearing. "It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). And, while we agree that plaintiff did not expand her motion to specifically request a change in both legal and physical custody until after the court decided to schedule the evidentiary hearing, the trial court's inaccurate statement in this regard was harmless, given that an evidentiary hearing was necessary. *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996).

III. Change of Custody

Defendant next argues that the trial court erred in granting plaintiff's motion for a change of custody following the evidentiary hearing. Because the trial court failed to make reviewable factual findings on the best interests factors of MCL 722.23, we are unable to determine whether its ultimate conclusion to change the custody order was against the great weight of the evidence. Accordingly, we remand for further proceedings.

A. Standards of Review

Three standards of review are relevant to custody appeals. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008); MCL 722.28. Findings of fact should be affirmed "unless the evidence clearly preponderates in the opposite direction." *Phillips, supra* at 20. Discretionary rulings, including the court's ultimate custody decision, are reviewed for an abuse of discretion. *Id.*; *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). Lastly, "[q]uestions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003) (citations omitted).

B. Relevant Law

A trial court may modify, for the best interests of the child, its pevious custody orders or judgments "for proper cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c); *Vodvarka, supra* at 508-509. Proper cause means "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka, supra* at 511. It requires proof of "the existence of an appropriate ground for legal action to be taken by the trial court." *Id.* at 512. The appropriate ground or grounds "should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being." *Id.* A "change of circumstances" requires proof that "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513 (emphasis in original). The evidence must show "something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id.* at 513-514. Whether the requisite change occurs depends on the facts of each case, "with the relevance of the facts presented being gauged by the statutory best interest factors." *Id.* at 514

If the trial court determines that proper cause or a change of circumstances has been shown, the court is then required to determine whether an established custodial environment exists. See *Bowers v Bowers*, 190 Mich App 51, 53-54; 475 NW2d 394 (1991). A child's custodial environment is established "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). In making this determination, a court must also consider "[t]he age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship . . . ." *Id.* If an established custodial environment exists[1] with one parent and not the other, and the moving party seeks to change that custodial environment, then the moving party bears the burden of persuasion and must show by clear and convincing evidence that a change in the custodial environment is in the child's best interests. *Berger*, supra at 710. However, if altering or modifying a custody order will not change the established custodial environment, the moving party must show, by a preponderance of the evidence, that the change serves the child's best interests. See *Pierron v Pierron*, 282 Mich App 222, 245; ___NW2d ___ (2009) citing *Foskett, supra* at 7 and *Baker v Baker*, 411 Mich 567, 582; 309 NW2d 532 (1981).

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[1] This Court noted the following with respect to the established custodial environment:

> Whether or not an established custodial environment exists is a question of fact for the trial court to resolve based on the statutory factors. If the trial court determines that an established custodial environment in fact exists, it makes no difference whether that environment was created by a court order, whether temporary or permanent, or without a court order, or in violation of a court order, or by a court order that was subsequently reversed. [*Blaskowski v Blaskowski*, 115 Mich App 1, 6; 320 NW2d 268 (1982).]

Once the court has determined the applicable burden, it must next determine whether a change or modification of the existing custody order is in the child's best interests. This analysis involves a consideration of the best interests factors enumerated in MCL 722.23. Where joint custody is a consideration, the court must also consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b).

C. Analysis

Here, the trial court failed to articulate its factual findings under the best interests factors set forth in MCL 722.23. A trial court must render factual findings and conclusions with regard to each best interests factor, or at least render a finding regarding its applicability. *Parent v Parent*, 282 Mich App 152, 156-157; 762 NW2d 553 (2009). Although a trial court need not "comment upon every matter in evidence or declare acceptance or rejection of every proposition argued," *Baker*, *supra* at 583, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the court's findings. *Rittershaus v Rittershaus*, 273 Mich App 462, 475; 730 NW2d 262 (2007). The remedy when a trial court fails to make reviewable findings on the record, as the trial court failed to do here, is a remand for a new child custody hearing. *Id*. Accordingly, we remand for the trial court to make the required factual findings. Because of this remand for further proceedings, we do not address defendant's additional arguments on the lack of specificity, or indeed the absence thereof, of the trial court's threshold and custodial environment findings. However, on remand the trial court shall make reviewable findings regarding the threshold requirement of either "proper cause" or "change of circumstances," as well as reviewable findings regarding any established custodial environment and the respective burden of persuasion.

IV. The Minor Child's Writings

Because we are unable to properly review the trial court's findings, we express no opinion regarding defendant's claim that the trial court's decision was based in part on inadmissible hearsay contained in notes and poems written by the child, or defendant's speculation regarding whether the trial court improperly used information obtained from the child in a private interview to resolve factual disputes. The trial court should note on remand, however, that MCR 3.210(C)(5) establishes the limited use of the private interview. It permits the information received from the child to be applied to the best-interest factor involving the child's reasonable preference in MCL 722.23(i). See *Surman v Surman*, 277 Mich App 287, 302; 745 NW2d 802 (2007).

We further note that the admissibility of evidence generally depends on the purpose for which it is offered. See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801. Hearsay is inadmissible unless it falls within an exception in the Michigan Rules of Evidence, such as a statement of the declarant's then existing mental or emotional condition. See MRE 802; MRE 803(3); *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007); *Int'l Union v Dorsey (On Remand)*, 273 Mich App 26, 38; 730 NW2d 17 (2006). A statement that is offered to prove its affect on the listener is not hearsay. *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998).

Although defendant did not object to the use of the evidence at the evidentiary hearing, a court is not precluded from taking notice of plain errors affecting substantial rights. MRE 103(d). Here, the child's writings were subject to both potential hearsay and nonhearsay purposes. Plaintiff's discovery of the child's notes and the poems was used to explain what prompted her to file her custody motion. But the writings also contain statements of the child's emotional condition. Indeed, in its decision to change custody, the trial court found that the child's writings conveyed his misery. To the extent that the trial court also considered the child's statements to explain the basis of his misery, it erred in doing so because use of the statements for this purpose is not proper under MRE 803(3). See *Int'l Union*, *supra* at 38 (MRE 803(3) is a narrow rule that does not allow the admission of statements to explain a state of mind); see also *People v Hackney*, 183 Mich App 516, 527 n 2; 455 NW2d 358 (1990) (statement explaining past sequence of events from the standpoint of the declarant constitutes "a statement of memory or belief," which is explicitly excluded from MRE 803(3)).

On remand, we caution the trial court to base its decision on admissible evidence and to limit its consideration of the evidence provided by the child through his writings and the private interview to permissible purposes. If necessary, the trial court may, in its discretion, conduct a new hearing that includes updated information and any change of circumstances. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994); *Ireland*, *supra* at 469; *Parent*, *supra* at 157.

V. Parenting Time

Turning to defendant's claim that the trial court abused its discretion in limiting his parenting time to every other weekend, we again note that parenting time issues are generally governed by MCL 722.27a. See *Borowsky v Borowsky*, 273 Mich App 666, 688; 733 NW2d 71 (2007); *Brown v Loveman*, 260 Mich App 576, 595; 680 NW2d 432 (2004). Under MCL 722.27a(1) parenting time is granted in accordance with the child's best interests and "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." Where only a parenting time dispute is involved, a trial court need not render findings with regard to each best interests factor. *Hoffman v Hoffman*, 119 Mich App 79, 83; 326 NW2d 136 (1982).

In this case, however, the trial court's decision regarding defendant's parenting time was intertwined with its decision to change custody. Because we are remanding this case for further findings regarding custody, we also remand for the trial court to consider its parenting time decision in the context of its findings regarding custody. In the interest of providing a stable environment for the child, the trial court's current custody and parenting time order shall remain in effect until, and if, it issues a new order, except that the trial court may modify the order to allow defendant to have parenting time every other weekend in the upcoming summer, as agreed by plaintiff in this appeal.[2] See *Parent*, *supra* at 157.

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[2] Because we are remanding for further proceedings regarding the custody decision, it is unnecessary to address defendant's claim that the trial court abused its discretion in denying his

(continued…)

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Jane M. Beckering

(…continued)

motion for reconsideration.